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HAMLYN & CO. *v.* TALISKER DISTILLERY:[1] A STUDY IN THE CONFLICT OF LAWS.

THE question for discussion in this article is the true principle by which to determine what law shall govern as to the intrinsic validity and effect of a contract made between parties living under different systems of law, or having a foreign legal element in it from any cause whatsoever. As a preliminary step, it ought to be stated according to what system of law the question is to be examined. As Professor Dicey has pointed out,[2] the court, in which a question of this nature arises, always decides it in accordance with the law of its own country. A controversy in a Massachusetts court, for example, as to which of several competing systems of law shall be selected and applied to a contract, is always determined in accordance with principles of the law of Massachusetts, the law of the forum; although the expression *lex fori* in the conflict of laws is commonly used in a narrower sense, meaning the law which governs the remedy. To control the remedy, however, is but one function of the *lex fori.*

[1] [1894] A. C. 202.

[2] 6 L. Q. R. 1; 7 L. Q. R. 113. The principle worked out by Mr. Dicey, in the articles cited, has been stated by other writers on the conflict of laws, and is also known and valued by continental jurists. Windscheid says: "It is the merit of Wächter to have emphasized with energy that the question respecting the applicability of foreign law can be answered only out of the native law, and this conception at the present time is that almost universally prevailing." Lehrbuch (7th ed.), I. § 34, note 6. A different view is held by the Franco-Italian school. See Laurent, Droit Civil International, ii. Nos. 67–73, pp. 119–138.

There being a general harmony of decision in the courts of England and America upon the conflict of laws, it is not necessary to limit a theoretical discussion of this question to any particular jurisdiction; it may proceed according to the principles of the general common law. In 1760, in the case of Robinson *v.* Bland,[1] Lord Mansfield said: —

"The general rule, established *ex comitate et jure gentium*, is that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception, when the parties (at the time of making the contract) had a view to a different kingdom."

This rule, in a somewhat shorter form, as for example, "the nature, the obligation, and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view,"[2] has often been stated and applied by courts of the highest authority, both in England and America, and, until recently, might justly be looked upon as something settled and fundamental. A tendency to question it has appeared. Professor Westlake, in the third edition of his book, says: —

"Under these circumstances, it may probably be said with truth that the law by which to determine the intrinsic validity and effects of a contract will be selected in England on substantial considerations, the preference being given to the country with which the contract has the most real connection, and not to the law of the place of contract as such."[3]

As supporting this proposition, the learned author cites Jacobs *v.* Crédit Lyonnais,[4] and *In re* Missouri Steamship Co.[5] (cases decided since the appearance of his previous edition), and adds: —

"But in both cases a stress was laid by the learned judges on the intention of the parties as the governing element in the choice of a law which is not in accordance with the discussion preceding the §, and which, where the lawfulness of the intention is itself in question, as it was *In re* Missouri Steamship Co., I still find it difficult to reconcile with the logical order to be followed."[6]

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[1] 1 W. Bl. 234, 257, 258; s. c. 2 Burr. 1077. The two reports differ.

[2] See The Montana, 129 U. S. 397, 458.

[3] Westlake, Priv. Int. Law (3d ed.), § 212, p. 258.

[4] 12 Q. B. D. 589.

[5] 42 Ch. D. 321.

[6] Westlake, Priv. Int. Law (3d ed.), § 212, p. 258.

The test above suggested — "the law of the country with which the contract has the most real connection" — has not been adopted by later decisions; but, on the contrary, increased importance has been given to the intention of the parties as the controlling fact in selecting the applicable law.

In England, Hamlyn & Co. *v.* Talisker Distillery is the latest, and is likely to be a leading case. This was a Scotch action, at the instance of the Talisker Distillery, in right of the extinct firm of R. Kemp & Co., for damages and implement of an agreement made between Hamlyn & Co., merchants in London, and R. Kemp & Co., former owners of the Talisker Distillery in Scotland, whereby Hamlyn & Co. agreed to purchase all grains made by Kemp & Co., and to erect at the Distillery a patent grain-drying machine. Kemp & Co., on their part, agreed to work this machine, and keep it in repair, and to dry and bag up the grain, and deliver it free on board at Carbost, Skye, to the order of Hamlyn & Co., or otherwise, as required. This agreement was signed in London, and contained the following clause: "Should any dispute arise out of this contract, the same to be settled by arbitration by two members of the London Corn Exchange, or their umpire, in the usual way." This clause was valid by the law of England, but invalid by the law of Scotland, because the arbitrators were unnamed. Hamlyn & Co. contended that the action was excluded by the clause of reference, and hence the question came to be, which law should govern. The House of Lords decided, reversing the decision of the Court of Session, that the arbitration clause was governed by the law of England, and that further proceedings in the action should be stayed to await the result of the arbitration. The following passage from the speech of the Lord Chancellor, Lord Herschell, will show the grounds of the decision, namely: —

"Where a contract is entered into between parties residing in different places, where different systems of law prevail, it is a question, as it appears to me, in each case, with reference to what law the parties contracted, and according to what law it was their intention that their rights, either under the whole or any part of the contract, should be determined. In considering what law is to govern, no doubt the *lex loci solutionis* is a matter of great importance. The *lex loci contractûs* is also of importance. In the present case, the place of the contract was different from the place of its performance. It is not necessary to enter into the inquiry, which was a good deal discussed at the bar, to which of these

considerations the greatest weight is to be attributed, namely, the place where the contract was made, or the place where it is to be performed. In my view they are both matters which must be taken into consideration, but neither of them is, of itself, conclusive, and still less is it conclusive, as it appears to me, as to the particular law which was intended to govern particular parts of the contract between the parties. In this case, as in all such cases, the whole of the contract must be looked at, and the rights under it must be regulated by the intention of the parties as appearing from the contract. It is perfectly competent to those who, under such circumstances as I have indicated, are entering into a contract, to indicate by the terms which they employ, which system of law they intend to be applied to the construction of the contract and to the determination of the rights arising out of it." (pp. 207, 208.)

Lord Watson and Lord Ashbourne also delivered careful opinions; and all the judges agreed in the proposition that the question before them depended upon the intention of the parties. While the Lord Chancellor and Lord Watson expressly recognize that the place of making the contract is of importance, they do not accord to that fact any precedence or weight over other material facts; although both declared that it was not necessary to discuss the relative value of the place of making and the place of performance. The effect of the whole case, however, is to raise a grave doubt whether any presumption will be admitted in future, in England, in favor of the law of the place where a contract is made.[1]

On the other hand, the case is a distinct and weighty authority for the proposition that the intention of the parties is the ultimate and controlling fact upon which the selection of the law governing a contract depends. When the decision is read in connection with previous cases, it will be found that this proposition is not new. In 1865, in the case of Lloyd *v.* Guibert, in the learned and closely reasoned judgment of Willes, J., in the Exchequer Chamber, it is laid down as the general principle, "that the rights of the parties to a contract are to be judged of by that law by which they intended, or rather by which they may justly be presumed to have bound themselves."[2] Other passages of like import might be cited both from Lloyd *v.* Guibert, and other cases; and in the usual statement of the rule, as is shown by the form of it above quoted

[1] Sir Frederick Pollock, Contracts (6th ed.), 369 (*z*), says: "But Hamlyn & Co. *v.* Talisker Distillery, '94 A. C. 6 R. (July) 14, seems rather against any fixed presumption, and see Mr. Westlake's remarks."

[2] L. R. 1 Q. B. 115, 123.

from the opinion of Mr. Justice Gray in The Montana, it is clearly implied that if the parties manifest an intention to be bound by some law other than that of the place of making, such intention would be effective.

The intention of the parties in respect to the law under which they contract may be expressly declared, or it may be inferred from circumstances. The case of Hamlyn & Co. *v.* Talisker Distillery must be considered as a case falling under the former class. It is true the contract does not contain an express provision that it shall be governed by the law of England, but the clause of reference referred so directly to London, and the usages of the London Corn Exchange, that, by construction, it was equivalent to an express incorporation of the English law. It was so treated by the judges. Lord Watson said: —

"If they had stipulated that all disputes arising out of the contract were to be decided in the Court of Session, I should have been of opinion that they had in view the principles of Scotch law, and meant that their mutual stipulations should be construed according to these principles. And, to my mind, their selection from the membership of a commercial body in London of a conventional tribunal which is to act 'in the usual way,' or, in other words, in the manner which is customary in London, indicates, not less conclusively, that, in agreeing to such an arbitration, they were contracting with reference to the law of England." (pp. 212, 213.)

In the absence of any declaration of intention in the contract, whether express or derivable from it by fair construction, the court is obliged to consider all the circumstances from which a mutual intention in regard to the governing law may be inferred. These circumstances will now be reviewed.

1. If the contract or clause in question is valid by the law of one country, and invalid by the law of the other country, that is a circumstance of great cogency in favor of applying the law by which the agreement will be upheld. The reason is, that as the parties have entered into a transaction intended to have legal consequences, this intention implies a submission to that law which will enforce the agreement. In Hamlyn & Co. *v.* Talisker Distillery, the clause of reference was valid by the law of England, and invalid by the law of Scotland. This fact was considered by the judges. Lord Herschell said: —

"As I have already pointed out, the contract with reference to arbitration would have been absolutely null and void if it were to be governed

by the law of Scotland. That cannot have been the intention of the parties; it is not reasonable to attribute that intention to them if the contract may be otherwise construed; and for the reasons which I have given, I see no difficulty whatever in construing the language used as an indication that the contract, or that term of it, was to be governed and regulated by the law of England." (pp. 208, 209.)

Lord Ashbourne said: —

"This interpretation gives due and full effect to every portion of the contract; whereas the arbitration clause becomes mere waste paper if it is held that the parties were contracting on the basis of the application of the law of Scotland, which would at once refuse to acknowledge the full efficacy of a clause so framed. It is more reasonable to hold that the parties contracted with the common intention of giving effect to every clause, rather than of mutilating or destroying one of the most important provisions." (p. 215.)

Without asserting that this circumstance is conclusive, it should always be considered, and has been referred to in several important decisions[1] as a circumstance of great weight.

2. The reason for the importance of the place of making a contract has been thus explained: —

"The general rule is that the law of the country where a contract is made governs as to the nature, the obligation, and the interpretation of it. The parties to a contract are either the subjects of the power there ruling, or as temporary residents owe it a temporary allegiance: in either case equally they must be understood to submit to the law there prevailing and to agree to its action upon their contract. It is, of course, immaterial that such agreement is not expressed in terms; it is equally an agreement in fact, presumed *de jure*, and a foreign court, interpreting or enforcing it upon any contrary rule, defeats the intention of the parties, as well as neglects to observe the recognized comity of nations."[2]

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[1] *Re* Missouri Steamship Co., 42 Ch. D. 321, 337, 341; Peninsular & Oriental S. S. Co. *v.* Shand, 3 Moo. P. C. N. S. 272, 291; Pritchard *v.* Norton, 106 U. S. 124, 137; Bell *v.* Packard, 69 Maine, 105, 111; Wharton, Confl. (2d ed.), § 429. See also The Montana, 129 U. S. 397, 460, 461.

Savigny (Guthrie's transl., 2d ed., § 372, p. 223), says it has been asserted that the local law which will best support the juridical act in question must always be applied. For this proposition, to which Savigny does not assent, the only authority cited is Eichhorn, Deutsches Privatrecht, § 37, notes *f*, *g*. The passage in Eichhorn refers to cases where the *locus contractûs* is doubtful, as in the case of contracts concluded by letter, and rests upon D. 45. 1. 80: Quotiens in stipulationibus ambigua oratio est, commodissimum est id accipi, quo res, qua de agitur, in tuto sit. (ULPIAN.)

[2] Turner, L. J., in Peninsular & Oriental Steamship Co. *v.* Shand, 3 Moo. P. C. N. S. 272, 290.

In that part of the passage here quoted from Lord Justice Turner which refers to the principle of allegiance, whether permanent or temporary, an implication is suggested that the law of the place where the contract is made is imposed upon the parties and governs their agreement without reference to their intention. This implication, however, is destroyed by the remainder of the passage, which clearly refers the application of the law of the place of contracting to the will of the parties themselves. If, then, the law of the place of making applies by virtue of an "agreement in fact," such agreement must be based upon mutual intention. The presumption in favor of the law of the place of making, called a presumption *de jure*, is conceded to be rebuttable, and can therefore be controlled by evidence of a different intention. Being merely evidence, it also follows that the place of making may be of different degrees of importance in different cases. For example, in a case like Jacobs *v.* Crédit Lyonnais,[1] where two English mercantile houses, carrying on business in England, made a contract in London, to be performed partly in Algiers, where the law of France prevails, the place of making the contract is a fact of great importance, and was so treated by the court. On the other hand, in the case of a contract concluded by correspondence, or by telegraph or cable, or even by an agent, the place where the contract is made has very little, if any, tendency to show a mutual intention to submit to the law of that place. Furthermore it is often difficult to decide where a contract *inter absentes* was in fact concluded.[2]

Finally, the place where a given contract was concluded may be determined differently by different systems of law. Such a difference may be a question of practical importance in a case where there is a conflict between the common law and the law of a coun-

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[1] 12 Q. B. D. 589.

[2] It cannot be expected that this difficult subject, having a literature of its own, will be discussed here. Usually the question of the place where a contract is completed is not separated from that of the time when it is completed. Professor Langdell's discussion of the latter question is too well known to the readers of this REVIEW to need citation. See Holmes, The Common Law, 305; 7 Am. Law Rev. 433. The point is a subject of controversy among the continental jurists. Windscheid, Lehrbuch (7th ed.), II. § 306, and note 10; Savigny (Guthrie's transl., 2d ed.), § 371, pp. 214-216; Bar, Priv. Int. Law (2d ed.), §§ 270, 271. Also § 128, note E, p. 289. See Laurent, Droit Civil International, vii. Nos. 447 *et seq.* In the case of a unilateral contract, the place where the consideration is furnished would seem to be the place of making. Milliken *v.* Pratt, 125 Mass. 374. The nature of the consideration, however, may be such as to require acts to be performed in several different jurisdictions.

try governed by the Roman or continental system.[1] In such a case the place where the contract was made can be of no assistance whatever. To decide by either of the competing systems of law where the contract was made, and then to infer from the place where it was made what law should govern it, would be mere reasoning in a circle.

3. It will not be necessary to dwell long upon the place of performance. Its importance has always been placed upon the true principle, namely, that it has a tendency to show the intention of the parties. Thus Willes, J., in Lloyd *v.* Guibert, says the law of the place of making the contract ought to prevail, in the absence of circumstances indicating a different intention, "as, for instance, that the contract is to be entirely performed elsewhere."[2] Upon this ground the place of performance has often been allowed to override the presumption arising from the place of making, but like the place of making, its value as evidence of intention varies greatly in different cases. In some contracts the place of performance is expressly fixed; in others it is left to construction and inference from extrinsic facts; in still others, as in contracts of carriage, the performance may be partly in several different jurisdictions;[3] and again, of the different stipulations in the same contract, some may be performable in one jurisdiction, and some in another, as in Hamlyn & Co. *v.* Talisker Distillery, where the obligation of Kemp & Co. to deliver free on board at Carbost, Skye, was performable in Scotland, while the clause of reference was performable in London, and required the co-operation of both parties there.[4] It may also happen that in a given case the conflicting systems of law would fix different places of performance for

[1] Article 321 of the General German Commercial Code provides: "In the case of a contract concluded between parties at a distance, the time at which the contract is concluded is held to be the time at which the declaration of acceptance is delivered for forwarding."

"The place from which the declaration of acceptance is sent is the place of concluding the contract." F. Litthauer's note to Art. 321 above, citing Decisions of the Reichsoberhandelsgericht, vii. (2d ed.) 11.

[2] L. R. 1 Q. B. 115, 122.

[3] In Cohen *v.* South Eastern Ry. Co., a contract for passage between Boulogne and London, Brett, J. A., suggested that the law of each country might govern that part of the contract which was performed within it. 2 Ex. D. 253, 262, 263.

[4] In order to appreciate the full import of this case as an authority, it should be noticed that the clause of reference was both made in England and performable in England. The law of England might have been applied upon that ground, in accordance with a long line of previous decisions; but the House of Lords proceeded wholly upon the ground of the intention of the parties derivable from the contract.

the same stipulation.[1] The only rule which can be affirmed is that the place of performance, like the place of making, is a fact to be considered in each case, in connection with the other facts, as evidence of the intention in regard to the governing law. Even Savigny, who maintains that the place of performance determines the law which shall govern the contract, and in deference to whose authority that is the prevailing view in Germany, rests his theory upon the inference of a voluntary submission of the parties to the law of that place; but this inference he says is always excluded by an express declaration to the contrary.[2]

4. The forum, or place where suit is brought, is a circumstance sometimes referred to as tending to show the intention of the parties. In *In re* Missouri Steamship Co., a claim against an incorporated English company, in voluntary liquidation, by an American shipper, upon a contract made in Massachusetts for damage to cargo by reason of the negligence of master and crew, the question being what law should govern a clause in the charter party exempting the owners from liability for such negligence, Lord Justice Fry, in the course of the argument, said: "The clause is put in for the relief of the ship-owner. The natural forum for attacking an English ship-owner is England. Ought not the English law to govern?"[3] The Lord Chancellor, Lord Halsbury, also took the same point. The argument is, that the place where a remedy for breach of the contract, or any stipulation in it, is likely to be sought, is a circumstance tending to show a mutual intention to contract with reference to the law of that place. But as a rule the parties, at the time of making a contract, do not contemplate a breach, nor do they know with any certainty in what forum a remedy for breach will be sought. It may be conceded that there is always a probability that suit will be brought at the domicil of one of the contracting parties; but under the rules of the common law an action may be brought and prosecuted with effect in whatever jurisdiction the person of the defendant can be found,[4] or, in some cases, where his goods can

[1] Some of the continental codes contain provisions regulating the performance of contracts, and fixing the place of performance. General German Commercial Code, Arts. 324, 325; Civil Code of Saxony, §§ 702–710.

[2] Savigny (Guthrie's transl., 2d ed.), § 369, p. 196; § 372, p. 223.

[3] 42 Ch. D. 321, 333.

[4] Story, Confl. (8th ed.), §§ 538, 549; Westlake (3d. ed.), p. 212; Bar (2d ed.), 934, *et seq.*, Mr. Gillespie's note; Peabody *v.* Hamilton, 106 Mass. 217.

In the Roman law, according to Savigny's exposition, the forum would be of much

be attached. There is no general or fixed presumption that suit will be brought at the domicil of the defendant rather than of the plaintiff. In fact, as the choice of the forum rests with the plaintiff, he is likely to select that forum where the law will be most favorable to his claim. As a rule, therefore, the circumstance of the forum must be considered of slight importance in determining the governing law.

5. Nationality of the parties, a circumstance of great and increasing importance in private international law on the continent of Europe,[1] is seldom referred to, as an independent fact in contradistinction to domicil, by courts administering the common law. The domicil of the parties, a fact of the greatest importance in questions of personal status and capacity, and in the contract of marriage, although often mentioned in questions relating to the law which shall govern an ordinary contract, is seldom made the basis of elaborate argument. In Hamlyn & Co. *v.* Talisker Distillery, the residence of the parties was mentioned,[2] but no special importance was attached to it.

When both contracting parties have the same domicil, the inference is strong that they are dealing with reference to the system of law under which they are living. What is to be said when the parties have different domicils?

Professor Bar contends that the law of the debtor's domicil is, in principle, the true starting-point from which to determine the governing law. He gives the preference to the domicil of the debtor, for this reason, "that the general propositions of law in the matter of obligations, the rules which do not give way to the pleasure of the individuals, exist generally in the interest of the debtor." Further, he says: "The person of the debtor is without doubt more closely bound up with the whole legal relation than that of the creditor." And the debtor must be understood as promising performance in the sense of the law which he knows, that is, to which he is personally attached.[3] This theory, however, cannot be accepted. It cannot be admitted that a preference should be

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greater significance as to the intent of the parties, since suit had to be brought either at the domicil of the defendant or within the forum *contractûs*, so called, the plaintiff having his election between those places. Savigny (Guthrie's transl., 2d ed.), § 372, p. 223.

[1] See Bar (2d ed.), § 28, p. 252.

[2] [1894] A. C. 206, 211, 213.

[3] Bar (2d ed.), § 250, pp. 543-546; § 249, p. 539.

given to the personal law of the promisor or debtor, that is, generally speaking, to the law of his domicil. The parties have an equal interest in the obligation. If, on the one hand, the promisor or debtor must be understood to promise in accordance with the law of his domicil, it must be supposed that the creditor or promisee understands the promise and expects performance in accordance with the law of his domicil. Assuming that each party is ignorant of the law of the other's domicil, neither can justly contend that the obligation should be governed by his law. The fact of domicil, when the parties have different domicils, is in itself of no assistance in determining the governing law, because it has no tendency to prove a mutual intention, which is the controlling fact. When the contract is made *inter absentes*, by correspondence or otherwise, this proposition is clear. It is equally true, however, when one of the parties goes to the domicil of the other, and concludes the contract there. The importance to be given to the place of making the contract in such a case is greatly increased; while that of domicil remains unaffected.[1]

6. Other circumstances tending to throw light upon the question of the intention of the parties have been referred to in different cases by the courts. If the parties belong to different nations and speak different languages, the language used in making the contract, especially if it be in writing, may be of great importance. The same may be said of the form of the contract, if it is peculiar to the country of one of the parties, or of the use of legal terms peculiar to the law of one of the parties.[2] The circumstances which may become material in different cases are scarcely capable of being enumerated, much less of being assigned any fixed weight.

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[1] In order to apply the theory of the law of the debtor's domicil to a bilateral contract, the ingenious suggestion was made that such a contract can always be treated as made up of two separate unilateral contracts, each party being a debtor in respect to what he promises. Savigny (Guthrie's transl., 2d ed.), § 369, p. 195; Bar (2d ed.), § 250, p. 545. This suggestion, even if admitted to be sound, does not affect the argument. An unwarranted preference is still given to the law of the debtor. As to dividing a contract in the way suggested, see Laurent, vii. No. 450, p. 540.

Professor Bar (in § 250, p. 543) names Windscheid as among the adherents of his theory, which has strong supporters in Germany. Windscheid says: "The point of space to which binding legal relations belong, is determined through the domicil of the parties. In and by itself, not less through the domicil of the creditor than of the debtor." Lehrbuch (7th ed.), I. § 35. 3. Further, in a note to this section, note 4a, he criticises the position of Bar, and the similar position of Savigny, that the person of the debtor is more closely bound up with the entire legal relation than that of the creditor.

[2] See Nelson, Private International Law, 276; Krell *v.* Codman, 154 Mass. 454, 457.

The only principle which can be stated is that the materiality of circumstances depends in all cases upon their tendency to show the intention of the parties, while their weight must be determined by the circumstances of each individual case.

7. It is always to be assumed, of course, that the parties are dealing upon the basis of good faith. If, therefore, it should appear that one party, at the time of the contract, entertained an expectation in regard to the law which should govern it, and that the other party had knowledge, or ought to have had knowledge, of this expectation, *bona fides* may require that the law so contemplated by one party shall be applied. This consideration may modify the effect of any or all of the foregoing circumstances in a particular case.[1]

If the intention of the parties to a contract is to be the controlling fact in the choice of a governing law, it is important to understand in what sense that expression is used. In most cases it is probable that the parties at the time of contracting do not contemplate the possibility of a question as to what law shall govern, and therefore entertain no conscious intention upon the point. In Hamlyn & Co. *v.* Talisker Distillery, it is very unlikely that either party knew or even suspected that the arbitration clause was void by the law of Scotland and valid by the law of England, and that it might be necessary to determine which law should govern. Nevertheless, the House of Lords held that the language of the contract clearly showed a mutual intention in respect to the governing law. The case is an authority for the proposition that the expression "intention of the parties," in the choice of a governing law, is used in the same sense in which it is used throughout the law of contracts. The law cannot look into the minds of parties; but it takes note of what they say and do, and determines their intention from their external acts.[2] In cases where there is nothing in the language of the contract to show intention, the principle is the same. The question then is, What intention is reasonably to be inferred from all the material circumstances? or, as it was stated by Willes, J., in Lloyd *v.* Guibert, "to what general law it is just to presume that the parties have submitted themselves in the matter."[3] The point to be emphasized is, that

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[1] See Bar (2d ed.), § 251, p. 548; § 253, p. 553.

[2] Pollock, Contracts (6th ed.), 5; Holmes, The Common Law, 309.

[3] L. R. 1 Q. B. 115, 120, 121.

the intention sought is a true intention, in the sense of the law of contracts: that is, the reasonable meaning of the acts and language of the parties in view of all the material circumstances in the case.[1] It is not a rule of law imposed upon the parties, under the pretence, or fiction, of enforcing a mutual intention.

The chief practical objection which can be urged against abandoning the presumption arising from the place of making a contract is the uncertainty of decision which may result. But uncertainty exists under the present rule. In the important case of The Montana, which has already been referred to, a contract of affreightment between an American shipper and ship-owners having a place of business in New York and also in England, made and dated in New York and signed by the ship's agent there, contained a stipulation exempting the owners from liability for negligence of the master and crew, which was valid by the law of England, but void by the law of America as declared by the Federal, and many of the State Courts. The Supreme Court of the United States held that the American law applied, on the ground that a contract is presumed to be governed by the law of the place where it is made, and that there were no circumstances in the case to control the presumption. Soon afterwards, the English Court of Appeal, in the case of the Missouri Steamship Company, already cited, a case involving a similar stipulation, and presenting similar facts, reached an opposite conclusion. The Supreme Court in a very learned opinion by Mr. Justice Gray, collated and relied upon a long line of English decisions, while the Court of Appeal apparently assented to the general rule of law as it was stated in The Montana, but held that the contract and the circumstances showed an intention of the parties to be governed by the law of England. These de-

[1] "By 'intention' however we must always remember is meant, not the expressed or even the consciously entertained intention of the particular persons, but the intention which in the opinion of the Court most persons in the position of the particular parties would have entertained had their minds been called to the matter at the moment of entering into a contract or other legal transaction." 7 L. Q. R. 126 (A. V. Dicey).

Laurent expresses the thought in nearly the same form: "Car il ne faut point perdre de vue que le législateur est obligé de présumer ce que les parties auraient voulu, si elles avaient pensé à la loi qui régira leurs conventions." vii., No. 441, p. 531.

Professor Bar contends that it is misleading to reason from the intention of the parties, apparently upon the ground that the governing law is selected by positive rules independent of intention. Bar (2d ed.), § 247, pp. 536–538. He admits, however, that the decisions of the Imperial Court of Germany are opposed to his view.

cisions illustrate the uncertainty of the result in applying the existing rule. They also caused a diversity in the law of the two countries in an important class of maritime contracts.[1] Since the decision in Robinson *v.* Bland in 1760, in which Lord Mansfield laid down the rule in favor of the law of the place of making a contract, the conditions of commercial intercourse have undergone a revolution. Steam and electricity must have their effect on legal rules, and it is doubtful if there is any practical advantage or justice in maintaining this presumption longer.

On the other hand, it is not to be asserted that the intention of the parties, even if it is the true principle to be applied, will, in all cases and without limitation, determine the governing law. Only one of those limitations will be stated here. In Hamlyn & Co. *v.* Talisker Distillery, the clause of reference was void by the law of Scotland as against public policy, and it was argued that her courts should not be compelled to enforce it, even if the contract was governed by the law of England, and valid.[2] This argument was overruled by the House of Lords, upon the ground that since the Scots law permitted a reference where the arbitrators were named, an agreement in which they were not named could not be said to violate any fundamental or essential considerations of public policy. If the clause of reference had been in violation of such considerations, even though not *contra bonos mores*, nor criminal, nor expressly prohibited, it was implied by the judges that the courts of Scotland would not be compelled to enforce it. In other words, a contract may be valid, but not enforceable, and this distinction is of practical importance in the conflict of laws. The reader will find further illustration and discussion of the point in the recent interesting case of Emery *v.* Burbank,[3] by Mr. Justice Holmes.

William Schofield.

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[1] Lloyd *v.* Guibert, L. R. 1 Q. B. 115; The Gaetano and Maria, 7 P. D. 137; The Industrie, [1894] P. 58. See also The August, [1891] P. 328.

[2] As to the relation between the judicial systems of England and Scotland, see Bar (2d ed.), p. 94, Mr. Gillespie's note.

[3] 163 Mass. 326. In this connection it may be mentioned that after the decision in The Montana, it was usual for English ship-owners to insert in bills of lading, and contracts of charter party a clause providing that all disputes should be decided according to British law; or, that the contract was made with a view to the law of England. The Iowa, 50 Fed. Rep. 561; The Energeia, 56 Fed. Rep. 124; The Hugo, 57 Fed. Rep. 403; The Guildhall, 58 Fed. Rep. 796; The Majestic, 60 Fed. Rep. 624; The Glenmavis, 69 Fed. Rep. 472. This clause was generally held ineffective. According to the distinction taken in Hamlyn & Co. *v.* Talisker Distillery, the inquiry should be

whether the public policy involved is something essential or fundamental. If it is, a contract or stipulation in violation of such policy will not be enforced by the courts of a country where it exists. Nor is it material where the contract was made, or what law the parties had in view. In Fonseca *v.* Cunard Steamship Co., 153 Mass. 553, a contract for an ocean passage, made in England, and exempting the carrier from liability for negligence, was enforced, "notwithstanding that a similar contract made in Massachusetts would be held void as against public policy." (p. 557.) See also O'Regan *v.* Cunard Steamship Co., 160 Mass. 356; and compare Rousillon *v.* Rousillon, 14 Ch. D. 351. The point whether the policy in question was fundamental was not raised in any of those cases. By Act of Congress, Feb. 14, 1892, 27 Stat. L. 445, contracts exempting from liability for negligence of master and crew were prohibited.